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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Fall Term, 1997

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Petitioners,

v.

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari

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85 pp

QUESTION PRESENTED

When police actors shield from the public and a victim's family key facts which would form the basis of the family's civil claim for redress, is there a deprivation of the due process right of access to the courts?

PARTIES TO THE PROCEEDING

The parties before the court of appeals were Delores Swekel, Gregory Harrington, William Abair, Johnson Taylor, William Cooper and David Israel.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

APPENDIX vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Background 3
B. The Proceedings Below. 6

REASONS FOR GRANTING THE WRIT 10

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS' PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT'S RIGHT TO ADEQUATE, EFFECTIVE, AND MEANINGFUL ACCESS TO THE COURTS. 10

continued . . .

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SUPREME COURT SHOULD ESTABLISH A STANDARD FOR COURTS TO APPLY WHEN DETERMINING WHEN STATE ACTORS COVERING UP CRUCIAL FACTS AMOUNTS TO A DENIAL OF ACCESS TO THE COURTS. . . . 18

CONCLUSION 23

TABLE OF AUTHORITIES

Federal Cases

Agresta v. City of Philadelphia,
801 F.Supp. 1464 (E.D.Pa. 1992) 22

Barrett v. United States,
689 F.2d 324 (2nd Cir. 1982) 22

Bell v. City of Milwaukee
746 F.2d 1205, at 1261. (1984) 11, 15, 19, 20

Bounds v. Smith, 430 U.S. 817, 822,
97 S.Ct. 1491, 1495, 52 L.Ed.2d 72. (1977) 10

Crowder v. Sinyard,
884 F.2d 804, 811 (5th Cir. 1989) 18

Dinwiddie v. Brown, 230 F.2d 465, 469
(5th Cir.), cert. denied, 351 U.S. 971,
76 S.Ct. 1041, 100 L.Ed. 1490 (1956) 12

Fisher v. City of Cincinnati,
753 F.Supp. 681 (S.D. Ohio 1990) 21

Foster v. City of Lake Jackson,
28 F.3d 425 (5th Cir. 1994) 22

Germany v. Vance
868 F.2d 9, 14 (1989) 12

Gonsalves v. City of New Bedford,
939 F.Supp 921 (D.Mass 1996) 21

Graham v. National Collegiate Athletic Ass'n,
804 F.2d 953, 959 (6th Cir. 1986) 12

In re Cincinnati Radiation Litigation,
874 F.Supp. 796 (S.D.Ohio 1995) 22

Joyce v. Mavromatis,
783 F.2d 56 (6th Cir. 1986) 6, 7, 14

Love v. Bolinger,
927 F.Supp. 1131 (S.D.Ind. 1996) 18, 21

Rheuark v. Shaw, 628 F.2d 297
(5th Cir.1980), cert. denied, 450 U.S. 931,
101 S.Ct. 1392, 67 L.Ed.2d 365 (1981) 16

Ryland v. Shapiro,
708 F.2d 967, 975 (1983) 12, 20

Vasquez v. Hernadez,
60 F.3d 325,330 (7th Cir. 1995) 20

Waechter v. School Dist. No. 14-030,
773 F.Supp. 1005 (W.D.Mich 1991) 22

State Cases

Fazzalare v. Desa Indus., Inc.,
135 Mich. App. 1, 6 (1984) 7

Statutes

Title 28 U.S.C. § 1254(1) 1

Title 42 U.S.C. § 1983 . . . . . 2, 5, 9, 19, 20

APPENDIX

1. Order Denying Defendants' Motion to Amend the Record; United States District Court, Eastern District of Michigan, Southern Division February 20, 1996. . . . . A-1

2. Order of Dismissal; United States District Court, Eastern District of Michigan, Southern Division, May 25, 1995. . . . . A-2

3. Order Denying Plaintiff's Motion for Reconsideration, Eastern District of Michigan, Southern Division, August 29, 1995 . . . . . A-3

4. Opinion; United States Court of Appeals for the Sixth Circuit, July 23, 1997. . . . . A-4

5. Opinion; United States District Court, Eastern District of Michigan, Southern Division. A-5

Petitioners, Delores Marie Swekel, Personal representative of the Estate of Arnold F. Swekel ("Swekel"), respectfully request that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as electronic citation 1997 FED App. 0223P (6th Cir.)

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") was entered on July 23, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law. . ."

STATEMENT OF THE CASE

The fundamental question in this case is: How does a court assess whether a litigant's guarantee of adequate, effective, and meaningful access to the courts has been violated when state actors shield from the victim's family key facts that are necessary for success in a civil action for damages. It arises in the context of Swekel's claim, against certain River Rouge police officers, for a police cover-up and destruction of evidence amounting to denial of access to the courts in violation of 42 U.S.C. § 1983. Swekel's claim was dismissed by the Sixth Circuit on the ground that Swekel's underlying wrongful death claim was not completely destroyed by the police cover-up since she did not establish that the state court could not adequately deal with any problems of delay caused by the police

officers' cover-up and destruction of evidence. To fully appreciate the importance of the issues presented by this case, it is essential to consider the background of the case.

A. Background

On September 30, 1988, at approximately 11:00 p.m., Arnold F. Swekel attempted to cross a street in River Rouge, Michigan. While he was crossing the street, either one or two cars speeding down the street hit and fatally injured Mr. Swekel.

After the accident, a River Rouge police officer, Dwight Black, went to the scene and interviewed witnesses. Four witnesses told Officer Black that two cars were involved in the accident. Officer Black then filed a police report that provided a description of the two vehicles involved. After filing the report, Officer Black was removed from the case. Additionally, the daily log sheets, which were ordinarily retained in the police records, mysteriously disappeared. The daily log sheet would reveal that the accident was originally reported as involving two vehicles.

Mr. Swekel was in the hospital for seventeen days before he passed away on October 17, 1988. Delores Swekel, the widow and

personal representative of the estate of the decedent, repeatedly requested that the police interview her fatally injured husband in the hospital, but the police declined to do so.

Swekel alleged that members of the River Rouge Police Department ("Defendants") engaged in an immediate cover up of the second driver because the driver was the son of a high ranking police officer. Swekel based these allegations on witness reports that two vehicles were involved in the accident, with all evidence pointing towards the high ranking police officer or his son as being one of the drivers. Swekel alleged that the police never investigated whether the second driver was the high ranking police officer or his son. These allegations of non-investigation were based on: (1) Defendants' failing to perform forensic tests on the victim's clothing; (2) Defendants' disregarding the responding officers report that two cars were involved; (3) the responding officer, contrary to custom, being told not to attend the preliminary hearing; (4) Defendants' ignoring anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, or his son, Todd was one of the drivers who struck Mr. Swekel; (5) Defendants' refusal to investigate the link between the

Kulinskis and the second driver; (6) Defendants' refusal to interview Todd Kulinski; and (7) Defendants' failure to disclose to Swekel the anonymous tips implicating the Kulinskis despite the fact Swekel told the police she suspected Todd Kulinski.

Swekel successfully pursued a wrongful death action against the first driver. Swekel was precluded from bringing a second wrongful death action against the second driver because Defendants concealed key facts that would have provided the basis of her claim for redress. Since the police failed to investigate the identity of the second driver, Swekel never learned any concrete facts which clearly established the identity of the second driver prior to the expiration of the Michigan statute of limitations. Swekel's attorney at the time stated that when the statute of limitations expired he lacked sufficient factual basis to file suit against the second driver because of the police cover-up. He believed that it would be an ethical violation to file suit based on mere rumors and speculation. Accordingly, since Swekel's attorney was aware of Defendants' lack of investigation, he opted to file suit under 42 U.S.C. § 1983 claiming that the police cover-up denied Swekel access to the courts.

In reviewing the injustice of this case, it is worth noting that Swekel's claim is unlike most cover-ups where a death is caused by a state actor. A typical cover-up simply hides how the death actually occurred, not the parties involved; thus, the victim's family will already know who they might sue. What the victim's family does not know is the strength of their case. Swekel's situation is different in that what was hidden was not the way the incident occurred with a known perpetrator but the way the incident occurred as well as the identity or even existence of the perpetrator.

B. The Proceedings Below.

Swekel's federal case for denial of access to the courts was set to go to trial on May 15, 1995. On May 11, 1995, the district court ordered Swekel to show cause why it should not dismiss the case in light of *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (holding that plaintiff was not denied access to courts if she could file a viable suit in state court). Swekel argued to the district court that Defendants' cover-up of the identity of the second driver caused the statute of limitations to run and thus amounted to her being barred from legally filing suit. The district court stated that Swekel could

have filed a "John Doe" lawsuit against the second driver and then later amended it when she discovered the identity of the second driver. Despite the fact that a "John Doe" suit would not have tolled the statute of limitations in Michigan, *see e.g. Fazzalare v. Desa Indus., Inc.*, 135 Mich. App. 1, 6 (1984), the district court reasoned that with the aid of discovery Swekel may have been able to discover the identity of the second driver. The court also reasoned that such discovery might occur prior to expiration of the statute of limitations. Consequently, the district court granted summary judgment in favor of Defendants *sua sponte*. Swekel moved for reconsideration, which the district court denied. The district court noted that *Joyce* held that no underlying constituional violation ever occurs when a police cover-up fails to prevent a plaintiff from filing suit. The court further stated "Joyce is still the law, . . . even though other district courts have in effect undermined it . . . So, then this court will dismiss this case, and I assume that plaintiff will promptly appeal, and I think you should." *Transcript of Hearing on Trial court's Order to Show Cause*, Appendix Document 5 at 14.

Swekel then timely filed an appeal with the Sixth Circuit. The Sixth Circuit held that, despite the district court's reliance on *Joyce* as the basis for dismissing Swekel's claim *sua sponte, Joyce* was not dispositive of this case. The Sixth Circuit held that since *Joyce* involved alleged post-filing abuses whereas Swekel's case involved pre-filing abuses; therefore *Joyce* was not controlling. Despite this finding, the Sixth Circuit still affirmed the district court's ruling because Swekel never presented evidence that the state court could not adequately address the actions of the defendant police officers. The Sixth Circuit realized that the police cover-up may have prejudiced Swekel's ability to recover in state court. Despite recognizing this potential prejudice, the Sixth Circuit disregarded the prejudice. The Sixth Circuit reasoned that the plaintiff bears the burden of presenting evidence that defendants' actions actually rendered any available state remedy ineffective. The court further held that, since Swekel had not filed a state court action, the court could not assess whether access was meaningful and effective.

The import of the opinion below is clear. The Sixth Circuit refuses to sustain a claim for denial of access based on police cover-up

unless the plaintiff first filed suit against the unknown defendant. This leads to the inescapable conclusion that if a police cover-up successfully hides the true facts from the victim's family until the statute of limitations has run, then the victim's family is without redress. Under the Sixth Circuit's ruling, a remedy under § 1983 would not be available in the case of the most successful type of cover-up: the one in which the victim or his family is left with too little information to support the filing of a lawsuit within the statute of limitations period. Only where the cover-up is unsuccessful will there be remedy under § 1983. Though the opinion below indicates that in such a situation the remedy will be in state court. The ruling below will reward and encourage the most successful cover-ups. Thus, although purporting to recognize the right to access in police cover-up cases, the Sixth Circuit has placed such burdens and obstacles on the plaintiff that it has effectively precluded any claim for denial of access to the courts where the police cover-up of the facts of a crime is extremely effective.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS' PRIOR RULINGS ON THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT'S RIGHT TO ADEQUATE, EFFECTIVE, AND MEANINGFUL ACCESS TO THE COURTS.

Swekel's petition for writ of certiorari should be granted because the opinion below conflicts with other circuits' prior rulings on a litigant's fundamental due process right of access to the courts. In clarifying this due process right, this Court has established that judicial access must be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72. (1977) (holding that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law)

Prisoners' rights to access the courts have been the subject of many cases, including Supreme Court cases. Thus, a prisoner's right

to access the courts is well defined. Though a majority of right to access cases are in the prisoner context, the right to access the courts has been extended beyond a prisoner's right to access the courts. The right is now implicated when state actors withhold key information from parties when the state actor is obligated in his official capacity to disclose the information. This extension encompasses a police cover-up. Though the right to access has been extended beyond prisoners' rights, what that right entails in such extended areas has not developed nor been defined in the same manner that a prisoner's right to access courts has been.

The extension of the right to access is recognized by several of the circuit courts in different factual situations. The Seventh Circuit stated "and therefore when police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged." *Bell v. City of Milwaukee* 746 F.2d 1205, at 1261. (1984) (holding that a twenty year police cover-up of an unlawful killing amounted to a denial of access.) The Fifth Circuit has held that "if state officers conspire . . . in such a way as to defeat or prejudice a litigant's rights

in state court, that would amount to a denial of equal protection of the laws by persons acting under color of state law." *Dinwiddie v. Brown*, 230 F.2d 465, 469 (5th Cir.), cert. denied, 351 U.S. 971, 76 S.Ct. 1041, 100 L.Ed. 1490 (1956). The Fifth Circuit later stated "any interference with a substantive constitutional right, such as the right to access the courts, may by itself amount to a constitutional deprivation". *Ryland v. Shapiro,* 708 F.2d 967, 975 (1983). The First Circuit has held that "An individual certainly has at least as strong a need to know the key facts of his or her case in order to determine whether a colorable claim exists." *Germany v. Vance* 868 F.2d 9, 14 (1989). The Sixth Circuit Court of Appeals has also made clear that the right of access to the courts is a fundamental right found in the Due Process Clause. *See, Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986).

Though there is agreement among the circuits that the right to meaningful, adequate and effective access has been extended to include police officials withholding key information, the circuits are not in accord as to when a particular cover-up rises to a constitutional violation. In the case below, the Sixth Circuit held that "The plaintiff

must establish that such abuse denied her 'effective' and 'meaningful' access to the courts." *Swekel v. City or River Rouge*, Opinion of 6th Circuit page 9 Appendix Document 4. "She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had." *id*. The court below recognized the prejudice the police cover-up caused: "Swekel alleges that the police covered-up proof against one of their own, destroyed critical evidence and delayed Swekel's own investigation. These allegations, if true, would substantially prejudice Swekel's ability to recover in state court." *id* at10. Despite the recognition of the prejudice the court then stated "Swekel, however, never presented evidence that the state court could not adequately address these problems." *id*. Accordingly, the court below found no violation of Swekel's due process right to access the courts.

Judge George E. Woods the district court judge in Michigan who dismissed Swekel's action stated "It may well be that the United States Sixth Circuit Court of Appeals will hold or opine that the *Joyce* Opinion is not reasoned all that well, but because some might feel it

ignores what all other circuits have stated, or at least other circuits have stated, that is, access to the courts claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The state actors do not have to have destroyed the claim to have violated the Constitution."(emphasis added) *Trial Transcript* at 11. Though the Sixth Circuit did not decide this case based solely on *Joyce,* it did come to the same conclusion with a similar rational. In *Joyce* the Sixth Circuit required the plaintiffs to demonstrate a high degree of actual impairment of access before it will find that a plaintiff's right of access to the courts has been violated. Likewise in the case below the Sixth Circuit required Swekel to demonstrate a high degree of actual impairment of access; "Swekel bears the burden of showing that such actions foreclosed her from filing in state court." *Swekel,* at 10. No other circuit requires plaintiff to demonstrate such a high degree of impairment of access before finding a denial of access to the courts.

In direct contrast to the Sixth Circuit, the Seventh Circuit found a violation of the right to access in a related situation. "This constitutional right is lost where, as here, police officials shield from

the public and the victim's family key facts which would form the basis of the family's claim for redress." *Bell,* 746 F.2d at 1261. The Seventh Circuit later clarified what amounted to a violation of access "Not every act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." The Seventh Circuit further held that " the cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action rendering hollow the plaintiffs' right of access." *Vasquez v Hernadez,* 60 F.3d 325, 329 (7th Cir. 1995). Applying the *Bell* analysis to Swekel, it is clear that the Seventh Circuit would have found a constitutional violation since police officers shielded key facts from the victim's family. Also, under the more stringent standard in *Vasquez,* there would still be a constitutional violation since Swekel's right of access was rendered hollow. Since the Sixth Circuit and Seventh Circuit would reach different outcomes under identical facts, there is a split between these circuit courts which this Court should resolve.

Also in contrast to the Sixth Circuit, the Fifth Circuit has held that delay alone may constitute sufficient prejudice to amount to a

violation of access to courts. "Conduct by state officers which results in the delay in the prosecution of an action in state court may cause such prejudice . . . As we stated in *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir.1980), cert. denied, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981): Delay haunts the administration of justice. . . . The most erratic gear in the justice machine is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination." *Ryland*, 708 F.2d at 974. (holding that the case should be remanded to allow plaintiff to establish that an eleven month delay constituted a constitutional deprivation and also to determine whether the constitutional deprivation caused any real damage.) Though not deciding that eleven months was sufficient to establish a violation of access, the Fifth Circuit recognized that an eleven month delay may be sufficient to establish a constitutional violation even though eleven months was a shorter time than the statute of limitations. Unlike the Fifth Circuit, the Sixth Circuit refused to allow the plaintiff, in the case below, the opportunity in court to establish whether a delay of three years, was a constitutional violation. This ruling was made

despite the fact that the three year period was longer than the statute of limitations. Therefore, once again, the Sixth Circuit is clearly in conflict with another circuit court. If the Fifth Circuit allows a plaintiff who suffered eleven months of delay the opportunity to establish a denial based on such a short delay, the Fifth Circuit would certainly afford that same opportunity to a victim of a three year delay.

Swekel's petition should be granted so that this Court may rectify this split among the different circuits. The conflict among circuits is clear; other circuits have stated that a claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The Sixth Circuit ignores and conflicts with these other circuits because it requires that the state actors destroy a claim before finding a constitutional violation. This split is also evident since in the case below the Sixth Circuit found no violation whereas had the case been brought in other circuits a violation would have been found. Accordingly, this Court should grant the petition so as to rectify this split among the circuits

II.
THE PETITION SHOULD BE GRANTED BECAUSE THE SUPREME COURT SHOULD ESTABLISH A STANDARD FOR COURTS TO APPLY WHEN DETERMINING WHEN STATE ACTORS COVERING UP CRUCIAL FACTS AMOUNTS TO A DENIAL OF ACCESS TO THE COURTS.

Swekel's petition for writ of certiorari should be granted because the question of when a police cover-up amounts to a denial of access to the courts is an important federal question which has not been settled by the Supreme Court. "Although the judiciary has long acknowledged the existence of the right of access to the courts it can best be described as nebulous." *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989). "While it is clear that a cover-up such as the one alleged in this case can result in a denial of access to the courts it is equally clear that there are circumstances under which a cover-up does not deny access to the courts." *Love v. Bolinger*, 927 F.Supp. 1131 (S.D.Ind. 1996). Despite the fact that a cover-up may or may not deny access to courts, there is no bright line test, no balancing test, nor any other uniform standard for courts to apply in order to determine whether a police cover-up is a constitutional violation. The resulting ad-hoc analysis used by courts has resulted in confusion and

conflict among circuits and even within circuits. Accordingly, the Court should take this opportunity to define a standard that will guide future cases of cover-ups in § 1983 cases.

The difficulty this lack of a standard or guidance causes has been noted in a recent Seventh Circuit case. In *Vasquez,* a case dealing with how long a delay was needed to constitute a denial of access, the Seventh Circuit found that, unlike a twenty year delay, a six month delay was not sufficient to constitute a constitutional violation. In a dissent it was noted. ["The majority raises the valid concern that the length of the delay was minimal and casts the Vasquezes' plight as insignificant compared to the decades-long cover up that prevented the *Bell* plaintiffs from bringing their suit. The majority's view is that the four month delay has not prevented the Vasquezes from bringing suit well before the statute of limitations expired and, therefore, should be seen as a deprivation unworthy of constitutional protection. My principal difficulty with this approach is that it provides no guidance on how future courts or litigants might analyze threats to access to the courts posed by a conspiracy of state actors."] *Vasquez*, 60 F.3d at 330.

"Rather than simply concluding that a situation does not compare favorably to *Bell*, or attempting to set temporal boundaries for determining whether a particular delay caused by a conspiracy of state actors passes constitutional muster, I believe that the analysis should encompass a variety of factors, including the length of delay, the reason for the delay, and the prejudice caused by the delay." *Vasquez*, 60 F.3d at 330.

In many police cover-up cases, courts equivocate as to what the requirements are in order for a plaintiff to establish a § 1983 claim. Certain words are prevalent in these cases, such as: "might", "may be", "could be" and "can be". Some examples of such language are: "Thus, a fact finder *could* conclude that the alleged conspiracy;" *Ryland*, 708 F.2d at 975 "The defendants' actions could have prejudiced the Rylands' chance of recovery;" *id* "Moreover, it *could well* prove more expensive;" *id* "*may* by itself amount to a constitutional violation;" *id*; "efforts by state actors to impede an individual's access to courts or administrative agencies *may* provide the basis for a constitutional claim" *Vasquez*, 60 F.3d at 328. Many cases quote this equivocal language found in *Ryland*.

Though such language is to be expected to a certain degree in any question that is not easily resolved, the prevalence of it and the context of the words indicate an underlying uncertainty as to how a court should resolve a denial of access claim in a cover-up situation. By adopting a more detailed and informative standard to guide courts, this Court could permanently remove such uncertainty.

Though one might think that this case is an aberration and does not present an important federal question, there are a surprising number of very similar cases of cover-ups by state actors. A sample listing of some cases not already discussed follows: *Gonsalves v. City of New Bedford*, 939 F.Supp 921 (D.Mass 1996). (police beating caused death of suspect and police then engaged in intentional cover-up so that a jury could not determine which officer was responsible for the beating); *Fisher v. City of Cincinnati*, 753 F.Supp. 681 (S.D. Ohio 1990); (Motorist who had been involved in collision with off-duty police officer brought action against other officers and the city alleging there had been a cover-up of the officer's intoxication); *Love*, 927 F.Supp.; (Survivors of deceased arrestee brought claims against coroner alleging cover-up of circumstances of arrestee's death);

Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994); (Parents alleged that city officials conspired to deny them access to court by concealing evidence during discovery); *In re Cincinnati Radiation Litigation*, 874 F.Supp. 796 (S.D.Ohio 1995); (Cancer patients sued Department of Defense physicians who subjected patients to radiation exposure then covered up the exposure); *Waechter v. School Dist. No. 14-030*, 773 F.Supp. 1005 (W.D.Mich 1991); (Handicapped student's parents brought claim alleging that recess supervisor, school district, school board, school board president, superintendent, and principal conspired to cover up death of student); *Agresta v. City of Philadelphia*, 801 F.Supp. 1464 (E.D.Pa. 1992); (parents of suspect gunned down by police brought claim that investigation into incident resulted in denial of access to courts); *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982).

This partial list of recent cover-ups by state actors demonstrates that the question of when these cover-ups amounts to a constitutional violation is an important federal question. Likewise, it is important that this Court adopt a standard for all courts to apply to determine when a cover-up is a constitutional violation.

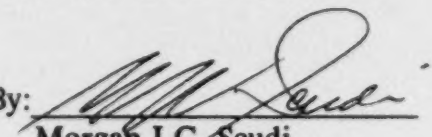
CONCLUSION

This case presents a question of exceptional importance --- whether a plaintiff must demonstrate that a police cover-up has destroyed the plaintiff's claim before there is a finding of a violation of the access the courts. If the opinion below is allowed to stand, Swekel, will have been denied due process and will forever suffer the consequences of the police cover-up. By granting Swekels' petition for certiorari, however, this Court can correct the Sixth Circuit's decision, which conflicts with other circuit's holdings that a police cover-up is a denial of access. In so doing, this Court can establish a standard that will lend meaningful guidance to the important question of the effect of deceptive acts by state actors and the right to access the courts. Accordingly, Swekel respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted

Dated: October 10, 1997

HUTH, LYNETT & SCUDI

By: 

Morgan J.C. Scudi
Attorney of Record for
Petitioner

DOCUMENT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff, No. 91-CV-76258-DT

v. HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION TO AMEND THE RECORD

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 20th day of February, 1996.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on defendants' motion to amend the record;

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that defendants' motion to amend the record shall be, and hereby is, DENIED.

This Court granted summary judgment in favor of defendants on May 16, 1995, and denied plaintiff's motion for reconsideration of the dismissal of her case on August 29, 1995. Plaintiff has appealed the dismissal of her case to the United States Court of Appeals of the Sixth Circuit and has filed her appeal brief.

Defendants now move to amend the record because "certain key deposition transcripts taken in this case were inadvertently not filed with the District Court and thus were not made a part of the District Court record." Defendants' Motion, p. 2. Defendants further assert that the transcripts "are integral to giving the Court of Appeals a full understanding of the facts of this case," and that "the information contained in these four key depositions has already been presented to this Court." Id. at 3.

Fed. R. Civ. P. 10(e) provides that a district court may correct the record on appeal "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein." As plaintiff points out, however, Rule 10(e) merely provides for the correction of

clerical error or error by the Court; it does not allow attorneys to correct their own inadvertence. Plaintiff also is correct that the Court allowed both parties an opportunity to supplement the record before it ruled on the motion for reconsideration. Further, the Sixth Circuit must review the merits of the Court's rulings in this case only in the context of the information that in fact was before the Court. Torrington Co. v. Local Union 590 of Int'l Union, 803 F. 2d 927, 932 (7th Cir. 1986); Jones v. Jackson Nat'l Life Ins. Co., 819 F. Supp. 1385, 1386-87 (W.D. Mich. 1993). Finally, if defendants are correct that the information at issue already has become part of the record, the instant motion is unnecessary.

For the reasons stated, defendants' motion to amend the record shall be, and hereby is, DENIED.

So ordered.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

DOCUMENT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

v.

United States District Court
Case No. No. 91-CV-76258-DT
HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

FRASER & McHUGH, P.C.
THOMAS G. McHUGH (P36175)
Attorney for Plaintiff
20 South Main
Suite 112
Mt. Clemens, Michigan 48043

ANDREW R. GRIFKA (P42348)
Attorney for Defendants
William Cooper and David Israel
600 Randolph
Second Floor
Detroit, MI 48226
(313) 224-5030

ORDER OF DISMISSAL

At a session of said Court held in the U.S. District Court,

Eastern District of Michigan on _____.

PRESENT: HONORABLE _____
U.S. DISTRICT COURT JUDGE

This matter having come on for hearing on May 16, 1995, upon the Court's sua sponte Motion to Show Cause why Plaintiff's Complaint should not be dismissed in light of the Court's reading of **Joyce v. Mavromatis, 783 F. 2d 56 (6th Cir. 1986),** and after having read the briefs submitted by the respective parties hereto and after being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Count II, the remaining count in Plaintiff's Complaint, is hereby dismissed for the reasons stated on the record on May 16, 1995.

IT IS HEREBY ORDERED.

_____
HONORABLE GEORGE E. WOODS
U.S. District Court Judge

DOCUMENT 3

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

-vs-

Case No. 91-CV-76258-DT
HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 29th day of August, 1995.

PRESENT: HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on plaintiff's May 30, 1995, motion for reconsideration of the Court's sua sponte motion

to dismiss, as well as plaintiff's June 19, 1995 supplemental brief and exhibits in support of her motion for reconsideration of the Court's sua sponte motion to dismiss;

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that plaintiff's motion for reconsideration shall be, and hereby is, DENIED.

I. INTRODUCTION AND FACTS

Plaintiff is the personal representative of the estate of decedent Arnold Swekel, who was struck in the City of River Rouge, Michigan, as a pedestrian in an accident involving either one or two cars on September 30, 1988. Mr. Swekel ultimately died from his injuries on October 17, 1988. Defendants were police officers working for the City of River Rouge when the accident occurred and during all other relevant times. Plaintiff filed this suit in 1991 pursuant to 42 U.S.C. § 1983, alleging in part that defendants violated her right to access the courts by concealing the identity of the driver of one of the two possible cars involved in the accident.

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Plaintiff has alleged that during the police investigation of the accidents, rumors emerged in the community that the identity of the second driver was the son of a high-ranking police officer. Plaintiff asserts in part that defendants (1) ignored anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, or his son, Todd, was one of the drivers who struck decedent, (2) failed to disclose to plaintiff the anonymous tips implicating the Kulinskis, despite the fact that plaintiff told the police that she suspected Todd Kulinski, (3) refused to investigate the possible link between the Kulinskis and the accident, even though some eye-witnesses has stated that two cars, not just one car, hit the decedent, (4) took the unusual step of not asking the officer who responded to the accident to attend the preliminary examination of the first driver, and (5) refused to interview Todd Kulinski. Plaintiff, who successfully pursued a wrongful death action against the first driver, argues that defendants' actions deprived her of a similar suit against the second driver.

Trial was scheduled to occur on May 15, 1995. The Court, however, dismissed the case on that date in an opinion from the bench. Plaintiff now requests reconsideration of the dismissal.

II. STANDARD

Local Rule 7.1(h) provides:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

This particular motion for reconsideration, however, comes before the Court in an unusual procedural posture. This case was scheduled for trial on May 15, 1995. The Court notified the parties by telephone on May 11, 1995 that it was ordering plaintiff to show cause why the case should not be dismissed in light of controlling precedent that the Court had found on the night of May 10, 1995 while researching one of plaintiff's motions in limine. The parties submitted briefs to the Court as requested on May 14, 1995, and the Court issued an opinion from the bench on May 15, 1995, dismissing plaintiff's remaining claim. Plaintiff accordingly filed on May 30, 1995 a motion for reconsideration and a brief in support ("May 30, 1995 Brief"), in which she requested the Court either to reverse its

decision immediately or to allow her to file additional briefs and exhibits. The Court responded by issuing an order on June 2, 1995, allowing plaintiff to file by June 19, 1995 any additional arguments or exhibits that she thought appropriate. The Court also allowed defendants to respond to any additional filings by plaintiff. Although plaintiff filed a second brief in support of its motion for reconsideration ("June 19, 1995 Brief"), defendants have not responded to the instant motion.

Given the brief period of time in which plaintiff had to react to the Court's May 11, 1995 order to show cause, as well as the fact that the Court now has before it a much more complete record, the Court will not hold plaintiff to Local Rule 7.1(h)'s general "palpable defect" standard. The Court instead will reexamine all of plaintiff's arguments and exhibits anew in order to determine whether she should proceed to trial on her right of access claim.

The Court must employ Fed. R. Civ. P. 56(c)'s standard for summary judgment motions when deciding whether a genuine issue of material fact exists as to whether plaintiff has a viable claim. In order to avoid summary judgment, plaintiff must identify sufficient evidence

in the record to allow a reasonable jury to find for her at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The sufficiency of the evidence is to be tested against the substantive standard of proof that would control at trial. Anderson, supra. Plaintiff should proceed to trial unless an absence of evidence supports her claim. Celotex v. Catrett, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. This Court must consider the evidence in the light most favorable to plaintiff, but it also may weigh competing inferences for their persuasiveness. Matsushita, supra.

III. ANALYSIS

Plaintiff has asked the Court to reconsider both its analysis of Sixth Circuit precedent and its application of that precedent to the facts. The Court will address each request in turn.

A. Interpretation of Sixth Circuit Precedent

The Court has ruled that the dismissal of plaintiff's case is compelled by the Sixth Circuit's holding in Joyce v. Mavromatis, 783 F.2d 56, 57 (1986), a case which narrowly construed the right of access to the courts. Plaintiff has argued that the Joyce opinion applied only an equal protection and procedural due process analysis, thereby failing to consider that the right of access to the courts is a fundamental right.[1] Plaintiff argues that this analytical failure led the Joyce Court to require plaintiffs in right-to-access cases to demonstrate that defendants successfully prevented them from filing a lawsuit. Plaintiff concludes that this requirement is no longer valid in light of the Sixth Circuit's subsequent ruling in Graham v. Nat. Collegiate Athletic Ass'n, 804 F. 2d 953, 959 (1986), that the right of access is fundamental.

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[1] Plaintiff's characterization of the law has been somewhat inconsistent. Plaintiff has argued occasionally that she has a right of *unhampered* access to the courts. See p. 3, Plaintiff's June 19, 1995 Brief. Nonetheless, plaintiff also has conceded occasionally that defendants could have violated her right of access only if they *completely* prevented her from filing a suit against the Kulinskis. See p. 4-6, Plaintiff's May 30, 1995 Brief.

Plaintiff's characterization of Joyce is incorrect. The Joyce Court explicitly indicated in two separate portions of the opinion that it was ruling on *three* distinct constitutional claims, one of which was a substantive First Amendment claim of access to the courts. See Joyce, 783 F. 2d at 57. The Joyce opinion therefore properly analyzed the right of access as a fundamental right, yet nonetheless construed that right very narrowly.[2] Moreover, Graham actually reaffirmed the holding in Joyce by implying that the right of access to the courts is not an expansive right. See Graham, 804 F. 2d at 959 (stating that "[plaintiff] cannot claim, however, that the defendants completely denied him access to the courts, since he successfully pursued his state court action ... Rather, [his claim] is more accurately characterized as a claim of retaliation for the exercise of a First Amendment right") (emphasis added).

B. Application of Joyce to the Facts

As noted, the instant issue turns upon whether defendants

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[2]The result in Joyce is consistent with the fact that the declaration of an abstract fundamental right, standing alone, reveals nothing about the practical content of that right.

prevented plaintiff from bringing a wrongful death action against one or both of the Kulinskis. The Joyce opinion allows an access to the courts claim to proceed only if the state actors have succeeded to a sufficient degree in denying a plaintiff actual access. An access to the courts claim therefore serves as a vehicle to recoup damages which should have been awarded in the lost cause of action, not as an opportunity to sue state actors for reprehensible but ultimately ineffectual actions. The constitutional violation arises from results, not mere effort.

The Court finds that, even if everything that plaintiff has alleged is true, no genuine issue of material fact exists as to whether plaintiffs eventually could have pursued a viable tort claim against either one of the Kulinskis. Plaintiff has submitted considerable evidence regarding what defendants knew during the three-year statute of limitations period about the link between the Kulinskis and the accident. What *plaintiff* knew about the alleged second driver, however, is also important for the purposes of the instant motion. Plaintiff admits:

> From September 30, 1988 through September 30,

> 1991, the information available to [plaintiff] and her attorney Judge Bajorek through their investigation was merely that there was a second driver. This information was forwarded by them to the police in 1989 and 1990 with a request that the investigation be reopened prior to the statute of limitations running. The police refused.

P. 10, Plaintiff's May 30, 1995 Brief. Plaintiff's belief in the existence of a second driver was based partly on the April 28, 1989 deposition testimony of the reporting officer, Dwight Courtland, that four witnesses had stated that two cars were involved, as well as direct deposition testimony on June 28 and December 5, 1989 by two of those witnesses. See Exhibit B, C, & D id. Plaintiff therefore firmly knew or thought that she knew by 1989 that a second driver had been involved in the accident.

After the police closed the criminal investigation into the accident, plaintiff reported to defendant Cooper that she had heard rumors that Todd Kulinski was the driver of the second vehicle. ¶ 4, Exhibit B, Plaintiff's June 19, 1995 Brief. Plaintiff also told defendant Cooper in 1989 that she felt that Todd Kulinski was in fact the second driver. P. 115-16, Exhibit A, Plaintiff's May 30, 1995 Brief. Moreover, plaintiff has admitted that, during the civil suit against the

first driver, her attorney "drove by the Kulinski residence and noticed a mid-size blue automobile in the driveway, which fit the description of the second car as testified by Estel Chaffins." ¶ 8, Exhibit A, Plaintiff's June 19, 1995 Brief.[3] Likewise, during a June 28, 1989 deposition, counsel for plaintiff asked an accident witness whether he knew Todd Kulinski. See P. 19, Exhibit D, Plaintiff's May 30, 1995 Brief. Plaintiff therefore believed by 1989 that Todd Kulinski was the second driver and made limited efforts to investigate and confirm that belief.

Judge David A. Bajorek, who represented plaintiff prior to the filing of this suit, has stated in an affidavit that he never was able to amass enough facts to sue the Kulinskis before the statute of limitations had run without risking sanctions for having filed an improper action based upon mere rumor. Exhibit A, Plaintiff's June

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[3]Plaintiff deposed EstelChaffins on December 5, 1989. Mr. Chaffins testified at deposition that two cars were involved in the accident and that the second car was a two-door, mid-sized, medium metallic-blue vehicle. P. 9, Exhibit C, Plaintiff's May 30, 1995 Brief. Counsel for plaintiff sent Mr. Chaffins' statement to the police in early 1990 when requesting that the investigation into the accident be reopened. ¶ 7, Exhibit A, Plaintiff's June 19, 1995 Brief; p. 120, Exhibit A, Plaintiff's May 30, 1995 Brief.

19, 1995 Brief. Likewise, plaintiff argues that it was only through discovery in this case that she finally determined with sufficient certainty the identity of the second driver.[4] Exhibit B, id. These assertions, however, directly contradict the fact that plaintiff felt that she had accumulated enough facts before the statute of limitations had run to file *this* lawsuit, a suit based upon the same "mere rumors" that apparently could not support a suit naming the second driver. Plaintiff cannot claim simultaneously that (1) she had sufficient knowledge, based on rumors in the community that Todd or Russell Kulinski was the second driver, to sue defendants for protecting somebody with connections to the police department,[5] and (2) she nonetheless lacked sufficient knowledge to file a tort suit naming the Kulinskis. Moreover, *even if* defendants succeeded in making plaintiff believe

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[4]Specifically, plaintiff states that the March 16, 1992 deposition of defendant Cooper and the October 22, 1992 deposition of Officer Robert Warren finally confirmed that the police had been protecting the Kulinskis. P. 6, Plaintiff's May 30, 1995 Motion.

[5]The premise of this suit is not and could not be that the police were merely very sloppy and thereby unwittingly allowed someone (who could have been anyone) to escape justice. See, e.g., Bell v. City of Milwaukee, 746 F. 2d 1205, 1261-62 (7th Cir. 1984).

that she could not file a suit immediately naming one or both of the Kulinskis, she still believed long before the statute of limitations period had run that defendants were protecting the Kulinskis. She therefore could have filed an earlier "John Doe" suit against the second driver and secured all of the same information she now has through discovery in that suit. Although John Doe suits do not toll the statute of limitations in Michigan, see, e.g., Fassalare v. Desa Industries, Inc., 135 Mich. App. 1, 6 (1984), plaintiff did not have to file her suit as she did, on the last possible day.[6] She at the very least had sufficient facts to file a John Doe suit, pursue discovery, and amend her suit by adding the particular identity of the second driver before the expiration of the statute of limitations.[7] Ultimately,

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[6]The statute of limitations in Michigan for wrongful death actions is three years from the time of the injury. Hardy v. Maxheimer, 429 Mich. 422 (1987). Because the accident occurred on September 30, 1988, the last day that plaintiff could have filed a lawsuit against the second driver was September 30, 1991.

[7]Plaintiff has argued that the Court mistakenly found during its May 15, 1995 dismissal of this case that plaintiff should have known about the involvement of the Kulinskis because defendant Cooper had disclosed in deposition in this suit that the police had received tips that one of the Kulinskis was the second driver. See P. 4, Plaintiff's May 30 Motion. The Court, however, was not relying

plaintiff could have, and should have, pursued a suit against the Kulinskis, even though she in fact did not.

IV. CONCLUSION

Accordingly, plaintiff's motion for reconsideration shall be, and hereby, is DENIED.

So Ordered.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

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upon this deposition testimony as evidence that plaintiff had sufficient knowledge regarding the Kulinskis to file suit before the statute of limitations had run. The Court mentioned defendant Cooper's testimony merely because it was reminding the parties that it previously had denied defendants' motion for summary judgment on the basis that the evidence, including the deposition testimony of defendant Cooper, had raised an issue of fact as to whether the police intentionally were protecting a particular person. See p. 13, Exhibit 1, Plaintiff's June 19, 1995 Motion in Support of Reconsideration. This reminder was part of an overall explanation that plaintiff could not proceed if her theory of this case was that the lack of an adequate investigation alone showed that the police must have been protecting "somebody." Id.

DOCUMENT 4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELORES MARIE SWEKEL,
Plaintiff -Appellant,

NO. 95-2031

V.

CITY OF RIVER ROUGE,

Defendant,

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, WILLIAM COOPER AND DAVID ISRAEL,

Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 91-76258--George E,. Woods, District Judge

Argued for Appellant: October 18, 1996
Submitted for Appellees: October 18, 1996

Decided and Filed: July 23, 1997

Before: MERRITT, JONES, and COLE, Circuit Judges

COUNSEL

ARGUED: Morgan J.C. Scudi, HUTH, LYNETT & SCUDI, San Diego, California, for appellant. **ON BRIEF:** Morgan J.C. Scudi, HUTH, LYNETT & SCUDI, San Diego, California, Thomas G. McHugh, Mt. Clemens, Michigan, for Appellant. John J. Cibrario, Westland, Michigan, for Appellee.

JONES, J., delivered the opinion of the court, in which COLE, J., joined. MERRITT, J. (pp. 12-14), delivered a separate concurring opinion.

OPINION

NATHANIEL, R. JONES, Circuit Judge. Plaintiff, Delores Swekel, appeals the district court's *sua sponte* dismissal of her suit under 42 U.S.C. § 1983 claiming that Defendants denied her access to the courts. Because Swekel failed to represent evidence that the Defendants' actions rendered a state court remedy ineffective, we now AFFIRM.

I.

On September 30, 1988, at approximately 11:00 p.m., Arnold F. Swekel attempted to cross a street in River Rouge, Michigan. While crossing the street, either one or two cars speeding down the street hit and fatally injured Mr. Swekel.

After the accident, Officer Dwight Black went to the scene and interviewed witnesses. Apparently four witnesses told Officer Black that two cars were involved in the accident. Officer Black then filed a police report that provided a description of the two vehicles involved. After filing the report, Officer Black was removed from the case.

Additionally, the daily log sheets for the night of September 30, 1988

disappeared after the incident. The Plaintiff alleges that the log sheet would reveal that the incident involved two vehicles.

Mr. Swekel was in the hospital for seventeen days before he passed away on October 17, 1988. Delores Swekel. ("Swekel"), the widow and personal representative of the estate of the decedent, allegedly requested that the police interview him during this period, but they declined.

Swekel claims that following the accident the police engaged in an immediate cover up of the second driver because he was the son of a high-ranking police officer. She alleges that even though the witnesses stated two drivers were involved, and all of the evidence pointed towards the high-ranking police officer or his son, the police never investigated either of them.

Accordingly to Swekel the Defendants: (1) failed to perform forensic tests on Mr. Swekel's clothes; (2) ignored the responding officer's report that two cars were involved; (3) told the responding officer not to attend the preliminary hearing, though it is customary for the responding officer to attend; (4) ignored anonymous tips stating that Russel Kulinski, a police commander at the time of the accident, or his son, Todd, was one of the drivers who struck Mr. Swekel; (5) refused to investigate the link between the Kulinskis and the second driver; (6) refused to interview Todd Kulinski; and (7) failed to disclose to Plaintiff the anonymous tips implicating the Kulinskis, despite the fact that Plaintiff told the police that she suspected Todd Kulinski.

Swekel successfully pursued a wrongful death action against the first driver. She claims that Defendants' actions deprived her of a similar suit against the second driver, because she could not discover his identify before her time to file suit expired under the Michigan statute of limitations. In fact, she claims that she did not discover the identify of the second driver until discovery in this suit. Swekel's attorney believed that as a result of the police coverup, he lacked the evidence to filed suit and would have subjected himself to sanctions if he filed suit.

The federal case for denial of access to the courts was set to go to trial

on May 15, 1995. On May 11, 1995, the district court ordered Swekel to show cause why it should not dismiss the case in light of *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (holding that plaintiff was not denied access to courts if she could file a viable suit in state court). In her brief to the district court, Swekel argued that the Defendants' cover-up of the identify of the second driver caused the statute of limitations to run and, thus, amounted to her legally being barred from filing suit. The district court disagreed and held that she could have filed a "John Doe" suit against the second driver in state court and then amended it when she discovered the second driver's identity.

The district court found that Swekel possessed a sufficient factual basis to file a "John Doe:" suit in state court. These facts are as follows: On December 5, 1989, the Plaintiff deposed Estel Chaffins, who testified that two cars were involved in the accident. Furthermore, in another deposition taken on June 28, 1989, Plaintiff's counsel asked an accident witness whether he knew Todd Kulinski. Finally, in early 1990, Plaintiff's counsel sent a copy of Mr. Chaffins's statement to the police and requested that they re-open the case. These actions demonstrated to the district court that Swekel knew of a second driver before the three-year statute of limitations had run and could have filed a suit in state court against a "John Doe" defendant. The district court conceded that "John Doe" suits do not toll the statutes of limitations in Michigan, *see, e.g., Fazzalare v. Desa Indus., Inc.* 135 Mich. App. 1, 6(1984), but reasoned that with the aid of discovery Swekel may have been able to discover the identify of the second driver before the statute ran. Consequently, the district court granted summary judgment to Defendants *sua sponte*.

Swekel moved for reconsideration, which the district court denied. She then filed this timely appeal.

II.

"We review a district court's grant of summary judgement *de novo*... {I} a motion for summary judgment, 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from

the facts are jury functions, not those of a judge... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Russo v. City of Cincinnati*, 953 F.2d 1036, 1041-42 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.), 477 U.S. 242, 255 (1986)*, and citing *Vollrath v. Georgia-Pacific Corp.*, 899 F.l2d 533, 534 (6th Cir., cert. denied, 490 U.S. 940 (1990)); see also *Rowley v. United States*, 76 F.3d 796, 799 (6th Cir. 1996). Summary judgment is appropriate when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. 56(c).

On appeal, Plaintiff argues Defendants denied her the right of access to the courts by covering up for a high ranking police officer and his son. "It is beyond the dispute that the right of access to the courts is a fundamental right protected by the Constitution." *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986). In fact, the right of access to the courts finds support in several provisions of the Constitution including: the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), the First Amendment, *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 482 (1969)), and the Privileges and Immunities Clause of Article IV, see, e.g., *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 1242, 148 (1907); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990).

The right of access in its most formal manifestation protects a persons;' right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice. *See Chambers*, 207 U.S. at 148 ({"In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."). Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Therefore, if a party engages in actions that effectively cover-up evidence and this action renders a plaintiff's state

court remedy ineffective, they have violated his right of access to the courts. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses."). Otherwise, to what avail would it be to arm a person with such a constitutional right, when the courtroom door can be hermetically sealed by a functionary who destroys the evidence crucial to his case. A contrary interpretation of this right would encourage "police officials to conceal the circumstances relating to unlawful killing committed under color of state law and other deprivations of federal rights Section 1983 was designed to remedy." *Id.*

Several courts have found that a state official's actions in covering-up evidence amounted to a denial of access to the courts. For example, in *Bell, supra*, the police covered up a murder by one of their officers by concealing key facts from the family of the murder victim. *Id.* at 1215-17. The court found that "a conspiracy to cover up a killing, thereby obstructing legitimate efforts to vindicate the killing, through judicial redress, interferes with the due process right of access to courts." *Id.* at 1261. The court reasoned that the "constitutional right [of access to the courts] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress." *Id.*

In *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), the parents of a murder victim filed suit alleging that two prosecutors covered up the fact that a murder had occurred and that the murderer was a fellow prosecutor. The plaintiffs claimed that by concealing such facts for eleven months, the defendants had caused them to delay bringing a wrongful death action against the murder, and thus "wrongfully interfer[ed] with their access to the state courts." *Id.* at 969-70. The Fifth Circuit held that the delay created by the defendants could be a constitutional deprivation if the conduct prejudiced the plaintiff's chances of recovery in state court. *Id.* at 974.

In another denial of access case, j*Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *denied*, 496 U.S. 974 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990), the Firth Circuit

summarized Ryland as follows:

> Ryland stands for the proposition that if state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantial reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation.

Id. at 812. The plaintiffs in *Crowder* claimed that the defendants seized their property and removed it from Texas to Arkansas, denying them the ability to bring suit in Texas to recover their property. *Id.* at 813. The court found that the plaintiffs were not denied access to the courts, and that the defendants were amenable to suit under the Texas Long Arm Statute. *Id.* at 814. The Fifth Circuit held that even through the property was removed from Texas, the plaintiffs had unimpeded meaningful access to both the state and federal courts to challenge the legality of the defendants' actions. *Id.*

The Defendants argue that this court's decision in *Joyce v. Mavromatis, supra,* is dispositive in this case. In *Joyce,* the plaintiff alleged that she was injured in an accident caused by the son of the Steubenville, Ohio, police chief. 783 F.2d at 57. She filed a § 1983 action claiming that the defendants, police officers, "sought to defeat her state court damage suit by revoking a traffic citation issued to the son [of the police chief]...in connection with the accident and by altering the police report filed by ...the officer who investigated the accident and by having new lines painted on the street at the intersection." *Id.* She argued that these actions violated her right to due process, access to the courts, and equal protection. The district court dismissed the action. This court affirmed. *Id.* The plaintiff knew the identify of the defendant, had a pending state court damage suit when the actions occurred, and could bring these allegations to the attention of the state court judge. Thus, the defendants did not deny her access to the courts, because she had all of the relevant facts at her disposal. Furthermore, this court found that "there is no

reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal case." *Id.*

The crucial distinction between the *Joyce* decision and this case is that the plaintiff in *Joyce* knew the identify of the defendant and had all of the requisite facts to file suit. Moreover, it appears that at the time the *Joyce* defendants took these actions, the plaintiff already had a pending "state court damage suit." *Id.* Thus, the *Joyce* plaintiff was not denied access to the court. None of the alleged abuses prevented her from filing suit or obtaining effective redress. See *Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1993). Therefore, *Joyce* is not dispositive of this case.

A court must analyze several factors before deciding whether a person's fundamental right of access to the courts have been violated. First, a court must ascertain whether the above occurred pre- or post-filing. When the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the abuse, and thus, an access to courts claim typically will not be viable.[1] If the abuse occurs pre-

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[1] Our decision to limit the right of access to the courts to pre-filing abuses in most instances finds support in both the Fifth and Seventh Circuits. In *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1993), the plaintiffs claimed the defendant's failure to maintain a traffic light caused their son's death, and that the defendants denied them access to the courts by concealing and suppressing evidence during discovery. *Id.* at 427. The Fifth Circuit held that "the right of access [to the courts]...encompasse[s] a right to file an action, but not the rights to proceed free of discovery abuses after filing." *Id.* at 430.

The Seventh Circuit reached a similar conclusion in Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1692 (1995). In *Thompson*, the plaintiff claimed the police used excessive force and denied him access to the courts by committing critical facts in their police reports. *Id.* at 852. The Seventh Circuit held that the defendants' actions did not amount to a denial of the plaintiff's

(continued...)

filing, then the plaintiff must establish that such abuse denied her "effective" and "meaningful" access to the courts. *Bounds*, 430 U.S. at 822. She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffectively any state court remedy she previously may have had. *See Crowder*, 884 F.2d at 812-13; *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 974-75. In most instances, state courts can address pre-filing abuses by tolling the statute of limitations or allowing for a "spoliation of evidence" lawsuit.

The case at bar involves alleged pre-filing the abuses. Swekel claims that the Defendants effectively denied her access to courts by failing to investigate the possibility of a second driver and covering up any such evidence. She claims that the Defendants' actions caused Michigan 's three-year statute of limitations to run before she could file suit. We agree with Swekel, that if true, the Defendants' actions are reprehensible. Yet, that is not the issue before us. Instead, we must determine whether their actions amounted to a constitutional violation.

The alleged actions occurred pre-filing, and thus, Swekel bears the burden of showing that such actions foreclosed her from filing suit in state court. The most compelling evidence would be if Swekel went to the state courthouse and was physically prevented or mechanically barred fro filing her lawsuit or her sit was dis missed as untimely. Swekel has not presented any such evidence. Therefore, we agree with the district court that Swekel has failed to show absolute denial from state court.

Our inquiry however, does not conclude at this point. This case does not involve an issue of whether the Plaintiff could enter the courthouse and file suit, but instead whether filing such a suit was rendered ineffective by the Defendants' actions.

Swekel alleges that the police covered-up proof against one of their

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[1](...continued)
right to access the courts because the plaintiff was present at the scene, knew all of the facts, and had sufficient facts to promptly file a law suit. *Id.* at 852-53.

own, destroyed critical evidence, and delayed Swekel's own investigation. These allegations, if true, would substantially prejudice Swekel's ability to recover in state court. Delay alone causes "state evidence and the fading of material facts in the minds of potential witnesses." *Ryland*, 708 F.2d at 975; *see also Rhewark v. Shaw*, 628 F.2d 297, 303-04 n.10 (5th Cir. 1980) (citation omitted) ("Delay haunts the administration of justice.... The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination."), *cert. denied*, 450 U.S. 931 (1981). Swekel, however, never presented evidence that the state court could not adequately address these problems.[2] In fact, none of the evidence before this court establishes that Swekel even attmepted to go to the state court in first instance. Before filing an "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective " and "meaningful"?

A plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions. Rather, the plaintiff must present evidence that the defendants' actions actually rendered any available state court remedy ineffective. Swekel has failed to do so.

III.

Accordingly, we **AFFIRM** the district court's grant of summary judgment.

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We recognize that in some instances it would be completely futile for a plaintiff to attempt to access the state court system. The Plaintiff, however, has not presented evidence that this is such a case.

CONCURRENCE

MERRITT, Circuit Judge concurring. I agree with the result reached and much of the reasoning of the court's opinion. But I do not agree iwth the pre-filing/post-filing distinction made by the court or its failure to make explicit the limitations on right of access claims.

In 1986, in the same kind of auto accident case as this one (involving the cover-up evidence by a police chief of his son's negligence). A unanimous court held:

> The First Amendment access-to-the-courts claim does not state a cause of action either. The plaintiff has the right under state law to file her damage suit and to offeroof about the accident and the alleged destructuon of relevant evidence. If she is able to prove that the police cief's son and his conferederates undertook to destroy evidence of the son's negligence as a driver, there is no reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defdendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal case.

Joyce v. Mavromatis, 783 F.2d 56 (6th Cir. 1986). The court in *Joyce* did not make the case turn on whether the state court lawsuit had laready b4een filed or not, and the court's opinion treates tis distinction as irrelevant. It treats it as irrelevant because if a state court is able to deal adequately with cover-up activities that occur after tn action has been filed, the state court is equally able to deal with sucha ctivities thato ccur before the action filed. A otential plaintiff is no less likely to receive adequate relirf ins tate ocurt merely because her allegations of a cover-up are placed in her initial complaint rather than in a motion or other

pleading following the initiation of the case.

The standard for a "right-of access to the courts" claims, whether treated under the First Amendment as part of the right "to petition the government for a redress of grievances" or as a procedural due process claim, sould require that the plaintiff alleged and prove that the state's judicial process does not rovide fair procedures to remedy the wong alleged. Proof of the lack of adequate state remedies is required by *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), in procedural due process cases and should be required in judicial access cases. It seems elementary that the federal right of access to the ocurts is not abridges when the state courts remain just as open to provide a remedy as the federal courts.

A concealment of evidence that would merely toll the running of the state statute of limitations or give rise to a state action for "spoliation of evidence"[1] does not "deny access" to the state courts. There must be an allegation and then a showing that the doors of the state courthouse have

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1

In Smith v. Howard Johnson Company, Inc., 615 N.E.2d 1037, 1038 (Ohio 1993), a United States District Court certified to the Supreme court of Ohio a list of questions concerning the existence of the tort of "intentional or negligence spoliation of evidence and/or tortious interference with prospective civil litigation." The Ohio Supreme Court unanimously answered the questions as follows:

> We answer the three questions as follows: (1) a cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.

Although the instant case comes from ichigan rather than ohio, there is no suggestion that Michigan would not provide a remedy in tort for the wrong alleged here.

been closed by the defendant's action or that the state court remedy has been rendered ineffective. We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort under § 1983. Right of access to the courts claims under the federal constitution should be reserved for situations in which adequate state remedies are made unavailable and should not include mere claims of interference with evidence.

DOCUMENT 5

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

-vs-

Case No. 91-CV-76258-DT
Hon. George E. Woods
Opinion

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District Court Judge, at 272 United States Courthouse, Detroit, Michigan, on Tuesday, May 15, 1995.

APPEARANCES:

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Official Court Reporter:

BARBARA C. CHATMAN, CSR-0077
277 United States Courthouse
Detroit, Michigan 48226

Detroit, Michigan

Tuesday, May 15, 1995

12:00 o'clock noon

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THE COURT: Let's see. Mr. McHugh, right?

MR. McHUGH: Yes.

THE COURT: Mr. Scudi?

MR. SCUDI: Yes, your Honor.

THE COURT: Did I mispronounce it? That is your most precious thing that you have.

Mr. Grifka and Mr. Olson.

Well, this is a little bit different than usual than what we have in the system.

Earlier today I was trying to think that after 46 years in the business as a lawyer and Judge, how many times that it has happened to me that the Court has in effect, sua sponte, come up with a motion or an Order to Show Cause sua sponte as to why a plaintiff's case should be or should not be dismissed.

Frankly, I am having difficulty trying to remember it ever

having happened. I suppose perhaps other Judges have had it happen, I am sure they have. But it doesn't happen too often I gather in the scheme of things.

One of the reasons being, of course, that merely because a complaint is filed in the Clerk's Office, whether we are talking about state or Federal Court, it doesn't mean that the Court should immediately assume in effect the role of co-counsel for the defense, and certainly not the plaintiff as well, as the case may be.

Let me go into the background of this case a little bit.

By the way, Counsel, you have, after this shotgun blast at you, you have both responded promptly in well-written briefs, and the Court is appreciative of that.

The plaintiff in this case is the personal representative of the estate of the decedent, a gentleman by the name of Arnold Swekel. This gentleman was killed as a pedestrian in an accident involving either one or two cars, as it turns out.

The defendants here were police officers when this accident took place and during all other relevant times.

The plaintiff filed suit in, I think, 1988, pursuant to Section

1983 of Title 42 of the United States Code, alleging at least in part that the defendants violated her right to access to the courts by in effect consciously, as a matter of conspiracy, concealing the identity of the driver of one of two cars that might have been involved killing this decedent.

The Court, as you are aware, of course, earlier remanded the plaintiff's state law claims and has granted summary judgment on all other claims except for the claim that Defendants violated Plaintiff's right of access to the courts by conducting a coverup. Pure and simple.

The plaintiff filed a motion in limine to exclude the defense of qualified governmental immunity on the 9th of May, 1995, a week ago. Then, as the way the ball bounced or the cookie crumbled, as they say, the Court in researching that motion first became aware of the potentially dispositive precedent of Joyce v. Mavromatis, M-A-V-R-O-M-A-T-I-S out of the Sixth Circuit in 1986.

So, then the Court, sua sponte, issued on May 12 an Order to show cause why the plaintiff's case should not be dismissed in light of the Joyce opinion.

The Court contacted all counsel here involved by telephone, requested written briefs to be filed by one o'clock p.m. on May 15, 1995, and informed counsel of the instant hearing here today. They have done so and it's a matter of yeoman services.

Clearly the plaintiff, without any question, enjoys a constitutional right of access to the courts. The precise issue before the court is whether the Sixth Circuit has defined that right to narrowly that, under the particular circumstances of this case, Plaintiff does not have a cause of action because Defendants could not have violated her right of access to the courts.

In the Joyce case, the Sixth Circuit indicated that it strictly interpreted the right of access to the courts. The plaintiff in that case, it is the Joyce case, claimed that she had been injured in an automobile accident caused by the local police chief's son. It rings a bell, doesn't it?

And that in the Joyce case, the police conspired to defeat her state court damage suit against the son by revoking a traffic citation issued to the son, altering the police report for the accident, and painting new lines on the street at the accident scene.

The Joyce Court upheld a dismissal of Plaintiff's First Amendment claim that Defendants had violated her right of access to the courts, stating as follows, and the Court quotes:

"The plaintiff has the right under Ohio law to file her damage suit and to offer proof about the accident and the alleged destruction of relevant evidence. If she is able to prove that the Police Chief's son and his confederates undertook to destroy evidence of the son's negligence as a driver, there is no reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal one."

The Joyce court added that Plaintiff should have an opportunity to pursue her claim in state court.

Now, next, we have a federal district court in the Southern District of Ohio who distinguished Joyce when it held that police could have violated a plaintiff's right of access by intentionally concealing the intoxication of an off-duty police officer who had

struck the plaintiff in an automobile accident. Referencing the Fisher v. City of Cincinnati case, in 753 F.Supp., a 1990 case.

The Fisher Court found the Joyce case inapplicable for three reasons:

In the first place, in Graham v. National Collegiate Athletic Association out of the Sixth Circuit, 1986, 804 F.2d, the Sixth Circuit recognized a claim and cause for action for a violation of the right of access.

Second, other circuits have recognized a cause of action specifically for police coverups, and the Graham opinion cited, of course, those cases.

Third, the Fisher court implied that the Joyce Court improperly analyzed the right of access claim as a procedural due process claim, rather than as a claimed violation of a specific constitutional guarantee.

Well, Counsel, this Court declines to follow the Fisher opinion for the simple reason it fails to adequately distinguish itself from the Joyce case. Although the Sixth Circuit acknowledged the abstract right of access to the courts in Graham, the facts of Graham

certainly did not concern a government coverup that was designed to shield a person from tort liability. The Graham Court instead allowed a plaintiff to pursue a right of access claim against state actors because they had retaliated against the plaintiff for having exercised his right of access to the courts.

Quoting that case:

> "Plaintiff cannot claim, however, that Defendants completely denied him access to the courts, since he successfully pursued his state court action. . . Graham's claim is therefore not the typical right of access claim. Rather, it is more accurately characterized as a claim of retaliation for the exercise of a First Amendment right. That is, [plaintiff] is claiming that he was kicked off the University football team in retaliation for filing the state court action."

Citing the Graham case. Graham, therefore, did not overrule, either explicitly or by implication, the precise holding that we find in the Joyce case out of the Sixth Circuit.

Further, although the Graham Court cited opinions from other

circuits which reached the opposite conclusion as the Joyce Court, it cited those opinions without discussion and merely for the proposition that an abstract right of access to the courts exists.

Well, regardless of the persuasiveness of opinions from other circuits, neither Graham nor any other Sixth Circuit case suggests that Joyce is no longer controlling precedent.

Finally, the Fisher case is simply incorrect when it suggests that Joyce analyzed the right of access to the Courts only as a due process violation, because Joyce explicitly analyzed the right of access claim as an independent violation of the First Amendment.

The plaintiff here has ably argued that the existence of a state-tort remedy is irrelevant when state actors violate a specific constitutional guarantee such as the right of access to the courts. This truth does not undermine the holding in the Joyce case.

As we have noted, Joyce did not rely exclusively on a due process analysis. The opinion also did not rest on the assumption that state tort remedies can cure an admitted violation of the Constitution. Joyce instead held that no underlying constitutional violation ever occurs when a police cover-up fails to prevent a plaintiff from filing a

suit. There is the crux of it.

The Sixth Circuit therefore requires the plaintiffs to demonstrate a high degree of actual impairment of access before it will find that a plaintiff's right of access to the courts has been violated.

Then, lo and behold, we have yet another opinion from the Southern District of Ohio, and it has distinguished Joyce on more compelling grounds than that set forth in the Fisher opinion.

The Court in the Cincinnati Radiation Litigation case out of 874 Fed., Southern District of Ohio, acknowledged that Joyce dismissed a plaintiff's right of access to the court's claim because she still had the ability to file her damages suit under state law, despite the conduct of the police officers.

The Cincinnati Radiation Court nonetheless refused to dismiss an access to the court's claim because, unlike in the Joyce case, the alleged cover-up had prevented Plaintiffs from suing for over 20 years after the injury occurred. Extraordinary on the facts. The decision in Cincinnati Radiation therefore turned o how long the defendants succeeded I concealing facts and preventing Plaintiffs

from pursuing possible tort claims.

Accordingly, this Court interprets Joyce and Cincinnati Radiation to hold that whether Defendants could have violated Plaintiff's right of access depends upon when Plaintiff became aware of the particular identity or the existence of the alleged second driver.

The fact that Plaintiff never has filed a state wrongful death suit against a particular individual alleged to be the second driver is not dispositive: the relevant inquiry is whether the plaintiff could have filed such a suit, if she had wanted to.

In this case, the decedent was struck on September 30, 1988. The statute of limitations in Michigan for wrongful death action is three years from the time of the injury. That is old law in the State of Michigan, as you know. That has been settled by the Hardy case and others as recently as late in 1987.

The plaintiff has alleged here that during the police investigation of this accident rumors emerged in the community that the identity of the second driver was the son of a high-ranking police officer. If my memory serves me, apparently the second in command.

Moreover, the plaintiff has asserted that Defendants received at least two anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, was one of the drivers who struck the decedent. Further, the plaintiff has asserted that these defendants ignored the possibility that Kulinski or his son Todd was involved in the accident.

When exactly Plaintiff first became aware that either Russell or Todd Kulinski could have been the second driver is unclear: although Plaintiff asserts that tips implicating the Kulinskis surfaced early in the investigation, Plaintiff's complaint states that the identity of the second driver is or was unknown.

Well, if the plaintiff knew or thought at the time of filing the instant lawsuit that Defendants engaged in a coverup specifically to shield one of the Kulinskis, then, under Joyce, Plaintiff could have pursued a state court claim against the Kulinskis or a John Doe, as they did later, as I understand it, and any coverup by the defendants would not have deprived the plaintiff of her right of access to the courts.

Parenthetically, and just as an open-end question, really, is the

actual identity the real question here? I don't think that it is. This Court does not feel that it is.

On the other hand, if the plaintiff did not become aware of the identity of the beneficiaries of the alleged coverup until after the statute of limitations had run, then Defendants may have violated Plaintiff's right of access even under Joyce. But that is not our case.

Parenthetically, if it is the plaintiff's position that she does not and never can know who the second driver is, and that the lack of an adequate investigation into the possibility of a second driver alone implies that the police must have been protecting somebody, then Plaintiff has admitted that she has no case.

The Court denied Defendants' motion for summary judgment as to the access to the courts claim in a bench opinion on February 22, 1993, because the deposition testimony of Defendant Cooper indicated that the defendants may have concealed facts specifically in order to protect one of the Kulinskis (rather than some mysterious and unidentified person).

The Court also noted when denying the motion for summary judgment that plaintiff only had a cause of action for an intentional

concealment by Defendants, rather than for a sloppy investigation. Plaintiff therefore states a valid claim only if an intentional coverup prevented her from suing Russell or Todd Kulinski before the statute of limitations expired on a wrongful death claim.

Now, in my years on the bench, I have never addressed by Court quite like this, but it's always a first time. So, I will put it this way:

It may well be that the United States Sixth Circuit Court of Appeals will hold or find or opine that the Joyce opinion is not reasoned all that well, but because some might feel it ignores what all other circuits have stated, or at least other circuits have stated, that is, access to the courts claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The state actors do not have to have destroyed the claim to have violated the Constitution.

Nonetheless, and in spite of those passing observations, Joyce is still the law as this court feels it is in its considered judgment, even though other district courts have in effect undermined it when purporting to have found the opinion factually distinguishable.

Now, this Court may suggest that all it lacks is that the Joyce opinion should be re-examined, but it is not this Court's function to throw down the gauntlet and try to set a new precedent: that is one of the United States District Court's reversing its own United States Court of Appeals. I am not that much of an activist, nor that adventuresome, believe me.

So, then the Court will dismiss this case, and I assume the plaintiff will promptly appeal, and I think you should; and that is as far as I can go as being of counsel to you, is to recommend that you take an appeal on this. Maybe you can get this thing settled in the Sixth Circuit.

You, Mr. Grifka, will prepare the appropriate Order and have it in to Ms. Henson at or before one o'clock tomorrow.

MR. GRIFKA: Thank you, your Honor.

THE COURT: Court is in recess.

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REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

_____

BARBARA C. CHATMAN, CSR-0077

Dated: _____

Detroit, Michigan

(2)

Supreme Court, U.S.
FILED
NOV 20 1997
CLERK

No. 97-0693

In The

Supreme Court of the United States

October Term, 1997

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Petitioner,

vs.

GREGORY HARRINGTON, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. The petition misrepresents that the petitioner was precluded from bringing an action for wrongful death against the purported second driver.	4
B. The petition misrepresents that the opinion of the United States Court of Appeals for the Sixth Circuit leaves a victim's family without redress where state actors successfully conceal the cause and circumstances of a death until the state statute of limitations has run.	9
Reasons for Denying the Writ	10
I. The Petition Should Be Denied Because There Is No Conflict Between The Decision Of The United States Court Of Appeals For The Sixth Circuit And Any Other United States Court Of Appeals Relating To The Right Of Access To The Courts.	10
II. The Petition Should Be Denied Because A Workable Standard For Determination Of When A Denial Of Access Has Occurred Exists And Is Uniformly Applied.	16
Conclusion	19

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Agresta v. City of Philadelphia, 801 F. Supp 1464 (E.D. Pa. 1992) 15, 16

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 11, 12, 13

Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) 16

Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 16

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 11, 12, 14, 15

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) ... 13, 14

Statute Cited:

42 U.S.C. § 1983 .....5, 12, 14, 15, 16, 17, 19

Rule Cited:

Supreme Court Rule 10 19

STATEMENT OF THE CASE

The petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit seeks this Court's review of the Court of Appeals decision affirming the district court's *sua sponte* grant of summary judgment. Petitioner, the plaintiff in the case below, is the wife of Arnold Swekel, who died from injuries received when he was struck by an automobile in the City of River Rouge, Michigan, on September 30, 1988. Police officers employed by the City of River Rouge investigated the incident, and identified one David Haener as the driver of the automobile that had struck and killed Arnold Swekel. David Haener was arrested, gave a full confession, pled no contest to the charge of negligent homicide brought against him and served a custodial sentence. Petitioner then prosecuted a successful action for wrongful death against David Haener in state court.

Petitioner, on the last day that an action for wrongful death could be timely filed in state court, instead filed a complaint in the United States District Court for the Eastern District of Michigan, against the City of River Rouge and several individual officers employed by the Police Department of the City of River Rouge, claiming *inter alia* that the named defendants had, while acting under color of law, deprived her of access to the courts. The essence of her denial of access claim was that the several named officers had attempted to conceal the fact that a second automobile had been involved in the incident ending in Arnold Swekel's death, and that the second automobile was driven by Russell Harrington, a high-ranking member of the Police Department of the City of River Rouge, or Todd Kulinski, Russell Kulinski's son.

Discovery was completed and the case was scheduled for trial before the Honorable George E. Woods, United States District Court Judge, on May 15, 1995. On May 12, 1955, Judge

Woods issued an Order to Show Cause why petitioner's complaint should not be dismissed. Judge Woods issued the referenced Order to Show Cause because he questioned whether the petitioner could establish that the cover-up alleged by petitioner had actually hindered petitioner's access to the state courts (Transcript of Hearing on Order to Show Cause, App. A-5, 12):

> Accordingly, this Court interprets *Joyce* and *Cincinnati Radiation* to hold that whether Defendants could have violated Plaintiff's right of access depends upon when Plaintiff became aware of the particular identity or the existence of the alleged second driver.
>
> The fact that Plaintiff never has filed a state wrongful death action suit against a particular individual alleged to be the second driver is not dispositive; the relevant inquiry is whether the plaintiff could have filed such a suit, if she wanted to.

On May 15, 1995, Judge Woods granted summary judgment in favor of the defendants, and dismissed the case. Judge Woods first concluded, as a matter of fact, that petitioner could have pursued a timely state court action against the alleged second driver, and for that reason could not establish a denial of access to the courts (*Id.*, 13):

> Well, if plaintiff knew or thought at the time of filing the instant lawsuit that Defendants engaged in a coverup specifically to shield one of the Kulinskis or a John Doe, as they did later, as I understand it, and any coverup by the defendants would not have deprived the plaintiff of her right of access to the courts.

Judge Woods then reasoned that because the facts demonstrated

that petitioner had (and had utilized) unhindered access to the state courts, and had more than sufficient knowledge to pursue a timely state court claim against the claimed beneficiaries of an alleged cover-up, petitioner simply could not establish a denial of access to the courts. Petitioner does *not* challenge the factual accuracy of those conclusions in seeking this Court's review.

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed the dismissal of the complaint by the district court. Petitioner claims that this case was

> dismissed by the Sixth Circuit on the ground that [petitioner's] underlying wrongful death claim was not completely destroyed by the police cover-up since she did not establish that the state court could not adequately deal with any problems of delay caused by the police officers' cover-up and destruction of evidence.

Pet., 2-3. Actually, the Court of Appeals, after *de novo* review, concluded as a matter of fact that:

> [T]he plaintiff *must present evidence* that the defendants' actions actually rendered any available state court remedy ineffective. Swekel has failed to do so.

(Emphasis added). *Swekel v. City of River Rouge*, Opinion of United States Court of Appeals for the Sixth Circuit, App. A-4, 9. The question presented to and decided by the Court of Appeals was not, as the petition suggests, whether petitioner's "underlying wrongful death claim was . . . completely destroyed", but rather whether petitioner had presented sufficient

evidence to establish that her access to the courts had been denied.

As detailed below, there is no cause for this Court's review of the factbound decision of the district court, and the factbound decision of the United States Court of Appeals for the Sixth Circuit, concluding that petitioner had not presented sufficient evidence to submit to the jury the claim that she had been denied access to the courts.

A. The petition misrepresents that the petitioner was precluded from bringing an action for wrongful death against the purported second driver.

Petitioner claims it essential to consider the "background" of this case to "fully appreciate the importance of the issues presented". Pet. 3. Respondents certainly agree that a review of the facts presented and evidence offered prior to the grant of summary judgment is essential. Those facts and that evidence unequivocally demonstrate that petitioner did not offer any credible evidence that she had been denied access to the courts. Similarly, those facts and that evidence demonstrates that the petition misrepresents the record in claiming that:

> Swekel was precluded from bringing a second wrongful death action against the second driver because Defendants concealed key facts that would have provided the basis of her claim for redress.

Id., 5. There was not a scintilla of credible evidence offered in support of the claim that petitioner could not have timely brought a wrongful death action against the Kulinskis; in fact, petitioner admits that her attorney in the state court action for wrongful death *elected* not to pursue such an action:

> . . . [S]ince Swekel's attorney was aware of Defendants' lack of investigation[1], he *opted* to file suit under 42 U.S.C. § 1983 claiming that the police cover-up denied Swekel access to the courts.

(Emphasis added). *Id.* Swekel's attorney *opted* to file a § 1983 action on the last day an action for wrongful death against the Kulinskis could timely be filed in state court.

Further, the factual record demonstrates that the petitioner conceded, and the district court found as fact, that from September 30, 1988, through September 30, 1991, she believed that a second driver was involved in the collision causing her husband's death (Order Denying Plaintiff's Motion for Reconsideration, App. A-3, 7). Petitioner conceded, and the district court found as fact, that Officer Dwight Black had been deposed by her attorney during state court proceedings, on April 11, 1989 and had revealed that four (4) witnesses had claimed that a second car was involved in the collision causing her husband's death (*Id.*, 7). Petitioner conceded, and the district court found as fact, that two (2) percipient witnesses had been deposed by her attorney during the state court action, on June 28, 1989 and then on December 5, 1989, and had stated that a second car was involved in the collision causing her husband's death (*Id.*, 7). Petitioner conceded, and the district court found as fact, that she had concluded not later than 1989 that Todd Kulinski was in fact the driver of the second car rumored to have been involved in the collision causing her husband's death (*Id.*, 8). Petitioner conceded, and the district court found as fact, that she had verified that the Kulinskis owned a vehicle similar in appearance to the second car rumored to have been involved in the collision causing her husband's death in 1989 (*Id.*, 8).

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1. Petitioner conceded that she has no cognizable claim, under 42 U.S.C. § 1983, for "lack of investigation".

The district court, in granting summary judgment in favor of the defendants, first noted that his decision turned upon whether "defendants prevented plaintiff from bringing a wrongful death action against one or both of the Kulinskis", and concluded as a matter of fact that the defendants had not (*Id.*, 9-11):

> The Court finds that, even if everything the plaintiff has alleged is true, no genuine issue of material facts exists as to whether plaintiff eventually could have pursued a viable tort claim against either one of the Kulinskis.

The Sixth Circuit Court of Appeals summarized the factual findings of the district court:

> The district court found that Swekel possessed a sufficient factual basis to file a "John Doe" suit in state court. These facts are as follows: On December 5, 1989, the Plaintiff deposed Estel Chaffins, who testified that two cars were involved in the accident. Furthermore, in another deposition taken on June 28, 1989, Plaintiff's counsel asked the accident witness whether he knew Todd Kulinski. Finally, early in 1990, Plaintiff's counsel sent a copy of Mr. Chaffins statement to the police and requested that they re-open the case. These actions demonstrated to the district court that Swekel knew of a second driver before the three year statute of limitations had run and could have filed a suit in state court against a "John Doe" defendant. The district court conceded that "John Doe" suits do not toll the statute of limitations in Michigan . . . but reasoned that with the aid of discovery Swekel may have been able to discover the identity of the second driver before the statute ran. Consequently, the

> district court granted summary judgment to Defendants *sua sponte.*

(Citation omitted). *Swekel v. City of River Rouge*, A-4, 4.

The Court of Appeals then found, as a matter of fact upon *de novo* review, that petitioner had presented insufficient evidence of a denial of access to the courts to survive summary judgment:

> The case at bar involves alleged pre- filing abuses. Swekel claims that the Defendants effectively denied her access to courts by failing to investigate the possibility of a second driver and covering up any such evidence. She claims that the Defendants' actions caused Michigan's three-year statute of limitations to run before she could file suit. We agree with Swekel, that if true, the Defendants' actions are reprehensible. Yet, that is not the issue before us. Instead, we must determine whether their actions amounted to a constitutional violation.
>
> The alleged actions occurred pre-filing, and thus, Swekel bears the burden of showing that such actions foreclosed her from filing suit in state court. The most compelling evidence would be if Swekel went to the state courthouse and was physically prevented or mechanically barred from filing her lawsuit or her suit was dismissed as untimely. Swekel has not presented any such evidence. Therefore, we agree with the district court that Swekel has failed to show absolute denial from state court.
>
> Our inquiry however, does not conclude at this point. This case does not involve an issue of whether

> the Plaintiff could enter the courthouse and file suit, but instead whether filing such a suit was rendered ineffective by the Defendants' actions.
>
> Swekel alleges that the police covered-up proof against one of their own, destroyed critical evidence, and delayed Swekel's own investigation. These allegations, if true, would substantially prejudice Swekel's ability to recover in state court. Delay alone causes "state [sic; stale] evidence and the fading of material facts in the minds of potential witnesses." . . . ("Delay haunts the administration of justice . . . The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination.") Swekel, however, never presented evidence that the state court could not adequately address these problems. In fact, none of the evidence before this court establishes that Swekel even attempted to go to the state court in first instance. Before filing an "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective" and "meaningful"?
>
> A plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions. Rather, the plaintiff must present evidence that the defendants' actions actually rendered any available state court remedy ineffective. Swekel has failed to do so.

Id., 9-10.

Thus, it is readily apparent that both the district court and

the United States Court of Appeals for the Sixth Circuit have concluded, as a matter of fact, that petitioner has *not* established, and in fact has offered no credible evidence to establish, that she was precluded from bringing an action for wrongful death against the purported second driver, and the petition misrepresents that she was.

B. The petition misrepresents that the opinion of the United States Court of Appeals for the Sixth Circuit leaves a victim's family without redress where state actors successfully conceal the cause and circumstances of a death until the state statute of limitations has run.

The petition, in describing the proceedings below, makes the claim that:

> . . . The Sixth Circuit refuses to sustain a claim of denial of access based on police cover-up unless the plaintiff first filed suit against the unknown defendant. This leads to the inescapable conclusion that if a police cover-up successfully hides the true facts from the victim's family until the statute of limitations has run, the victim's family is without redress.

Pet., 8-9. That statement is simply and unequivocally not true. The Court of Appeals specifically noted that in most cases claiming pre-filing abuses (just such as the one brought by the petitioner), such abuses are *easily* addressed in the state courts:

> A court must analyze several factors before deciding whether a person's fundamental right of access to the courts has been violated. First, a court must ascertain whether the abuse occurred pre- or post-filing. When the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the

> abuse, and thus, an access to courts claim typically will not be viable. If the abuse occurs pre-filing, then the plaintiff must establish that such abuse denied her "effective" and "meaningful" access to the courts . . . She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had . . . In most instances, state courts can address pre-filing abuses by tolling the statute of limitations or allowing for a "spoliation of evidence" lawsuit.

Swekel v. City of River Rouge, Opinion of Sixth Circuit Court of Appeals, App. A-4, 9). The Court of Appeals thus specifically addressed the circumstance where "a police cover-up successfully hides the true facts from the victim's family until the statute of limitations has run", and has specifically found that "the victim's family is [*not*] without redress" in the state courts under such circumstance.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND ANY OTHER UNITED STATES COURT OF APPEALS RELATING TO THE RIGHT OF ACCESS TO THE COURTS.

The petition's claim that the factbound decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of other Courts of Appeals is simply wrong. The petitioner reveals the essential flaw in her claim that she has been denied access to the courts by stating

> Swekel was precluded from bringing a second wrongful death action against the second driver because Defendants concealed key facts that would have provided the basis of her claim for redress. *Since the police failed to investigate the identity of the second driver, Swekel never learned any concrete facts which clearly established the identity of the second driver prior to the expiration of the Michigan statute of limitations.*

(Emphasis added). Pet., 5.

The central question posed in this case is whether, when individual police officers *unsuccessfully* attempt to conceal facts about the death of plaintiff's decedent, those individuals have acted in violation of plaintiff's right of access to the courts. Both the district court and the Court of Appeals unequivocally held that such an *unsuccessful* conspiracy did not violate petitioner's right of access, and no other United States Court of Appeals has issued an opinion in conflict with that of the Sixth Circuit.

Petitioner claims that the United States Court of Appeals for the Sixth Circuit requires that a plaintiff demonstrate a "high degree of impairment of access" to establish a denial of the right to access. Petitioner then claims, without any support that can be gleaned from the cases she cites, that the Court of Appeals imposes a *higher* burden than that imposed by other United States Courts of Appeals, seeking review on the basis of that perceived conflict. In fact, no such conflict exists.

In claiming that the United States Court of Appeals for the Sixth Circuit imposes a higher burden, the Petitioner relies upon *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), and *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). Petitioner's

Brief at 14-17. Neither *Bell* nor *Ryland* support the argument that a conflict between Courts of Appeals exists.

In *Bell*, Daniel Bell was shot and killed by Thomas Grady, a Milwaukee police officer. Another officer, Louis Krause, observed Grady plant a knife in the deceased Bell's hand, and both officers falsely claimed in their respective police reports that Grady shot Bell because Bell had threatened Grady with the knife. Twenty years later, Krause revealed that he and Officer Grady had covered up the true circumstances of Daniel Bell's death. Bell's relatives and estate sued the City of Milwaukee, the police department, and the two officers alleging, among other things, that the cover-up of the shooting deprived them of their due process right of access to the courts because by concealing the true facts, the officers prevented Bell's family members from realizing that they had a cause of action and seeking redress.

The Bell family had brought a state court action for wrongful death nearly twenty (20) years prior to filing the § 1983 action, and had settled the state court action for $1,800. The district court specifically found as a matter of fact that the parents, in settling the state court wrongful death action, had relied upon fraudulent misrepresentations made by the several defendants, and the district court specifically found as a matter of fact that the conspiracy between the defendants had prevented the proper functioning of the state judicial system. *Bell*, at 1226-1227. The *Bell* decision, to the extent that the decision is premised upon a denial of the right to access to the courts, is premised upon compelling proof that, and specific findings of fact that, the state court remedy available *had been* rendered ineffective. *Bell*, because of the singular facts the case presented, is of no assistance to the petitioner, and in fact militates against the position petitioner asserts. Absent a finding of fact that a state court remedy had been rendered ineffective by the defendants in the case at bar, the *Bell* decision is simply not persuasive.

Vasquez v. Hernandez, 60 F.3d 325, 329 (7th Cir. 1995), cited by Petitioner as imposing a more stringent standard than *Bell, supra*, actually imposes the identical burden as that imposed by the United States Court of Appeals for the Sixth Circuit in the case at bar — that to establish a denial of access, one must establish that the actions of the defendants rendered the state court remedy ineffective:

> We reiterate that by our holding, we do not mean to defend the defendants' actions. The deplorable nature of their conduct is without question. Nevertheless, though the Vasquezes are correct in their assertion that the wrongfulness of an act is judged at the time it is done, the constitutionality of that act may indeed depend on other contextual factors including the passage of time. "Not every act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." . . . The Vasquezes' constitutional rights were ultimately preserved in this case. The cornerstone of our decision in *Bell* was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, *rendering hollow the plaintiffs' right of access.* In this case, the cover-up failed to achieve such ends. There are no allegations claiming that the Vasquezes have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up. We agree, therefore, with the district court in holding that the delay caused by the defendants' alleged conspiracy failed to deprive the Vasquezes of their right to access.

Application of the rule announced in *Vasquez* to the case at bar would mandate summary judgment in favor of the respondents, because petitioner could not establish — indeed, did not even attempt to establish — that she was prevented from pursuing a

tort action in state court or that the value of such an action has been reduced by the cover-up.

Petitioner artfully (albeit unsuccessfully) sought to evade meaningful inquiry by the district court into whether she was prevented from pursuing a tort action in state court. The district court recognized, however, the paradox inherent in the claim that petitioner was denied access to the (state) courts by a cover up, coupled with the timely (*i.e.*, within the period of the statute of limitations for the filing of a state tort claim) filing of a federal court action premised upon claimed denial of access:

> Plaintiff cannot claim simultaneously that (1) she had sufficient knowledge based upon rumors in the community that Todd or Russell Kulinski was the second driver, to sue defendants for protecting somebody with connections to the police department, and (2) that she nonetheless lacked sufficient knowledge to *file a tort claim* naming the Kulinskis.

(Footnote omitted; emphasis added) (Order Denying Plaintiff's Motion for Reconsideration, App. A-3, 12). Comparing *Vasquez*, where there was no allegation that plaintiffs were prevented from pursuing a tort action in state court, with this case, where there was no credible evidence offered that the plaintiff was prevented from pursuing a tort action in state court, leads to the same conclusion — neither plaintiff(s) can prevail on a denial of access claim under § 1983.

Petitioner claims that the *Ryland* case somehow supports her position. The *Ryland* case does not speak to the very proposition that Petitioner claims the case is authority for. In *Ryland*, the United States Court of Appeals for the Fifth Circuit reversed the dismissal of a case alleging, *inter alia*, denial of access to the courts, on the basis that the Rylands had stated a cognizable cause of action:

> Their complaint alleged that agents of the state intentionally engaged in conduct that interfered with their exercise of their constitutionally protected right to institute a wrongful death suit in the Louisiana courts. As we have already shown, this theory of recovery is a valid one.

Id., at 973. *Ryland* provides absolutely no guidance for making the factual determination that the district court originally, and the United States Court of Appeals for the Sixth Circuit *de novo*, was confronted with and made in this case — that the petitioner had presented insufficient evidence — in fact, no evidence at all — that the courts of the State of Michigan could not provide her an effective remedy. *Ryland*, a decision assessing whether the complaint stated a cognizable cause of action under 42 U.S.C. § 1983, simply has no application to this case, which assesses the sufficiency of the evidence available to the petitioner to withstand summary judgment.

Petitioner claims that *Agresta v. City of Philadelphia*, 801 F. Supp. 1464 (E.D. Pa. 1992), somehow supports her position. In *Agresta*, the "parents of a suspect gunned down by police brought [a] claim that investigation into [the] incident resulted in denial of access to courts" (Pet., 22). In *Agresta*, the parents of the suspect sued the City of Philadelphia, and no individual defendant(s), claiming a denial of access to the courts. They did *not* prevail:

> [T]he Agrestas did not sue any individuals for concealing evidence or otherwise denying them their constitutional right of access to the Court. Plaintiffs have only sued the City itself. Even assuming the City, through its policymakers, desired to conceal the true facts of Samuel Agresta Jr.'s death, the Agrestas have not proven by a preponderance of the evidence that

> the City, through its policymakers, had a policy, procedure, custom, or lack of policy or procedure resulting in the denial of the Agrestas' constitutional right of access to the courts.

Agresta, supra, at 1474. *Agresta* certainly is neither a "very similar case involving a cover-up by state actors", as Petitioner claims, nor can the case serve as authority for any proposition at issue in the instant case. *See also Landrigan v. City of Warwick*, 628 F.2d 736, 742 (1st Cir. 1980), in which the First Circuit in 1980 affirmed the dismissal of a § 1983 cover-up claim because the plaintiff had prevailed in a state court action based on illegal police conduct and, therefore, had suffered no damages from the alleged cover-up.

II.

THE PETITION SHOULD BE DENIED BECAUSE A WORKABLE STANDARD FOR DETERMINATION OF WHEN A DENIAL OF ACCESS HAS OCCURRED EXISTS AND IS UNIFORMLY APPLIED.

The petition's claim that this Court should establish a standard detailing "when state actors covering up crucial facts amounts to a denial of access to the courts" is meritless. The petitioner asks that this Court *replace* the extant standard she has not and cannot meet, with a bright line rule she does not articulate. This Court articulated a workable standard in *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), when this Court stated that in order to establish denial of access to the courts, a plaintiff must establish that an abuse denied her "effective" and meaningful" access to the courts. *Bounds*, 430 U.S. at 822. The petition, in claiming that this Court should establish a standard detailing "when state actors covering up crucial facts amounts to a denial of access to the courts", thus

ignores an existing standard and ignores the simple, unassailable fact that both the district court and the United States Court of Appeals for the Sixth Circuit have concluded, as a matter of fact, that she was *not* denied meaningful and effective access to the courts of the State of Michigan

What the petitioner actually asks is that this Court hold that concealment of evidence, which would toll the state statute of limitations, is a federal constitutional tort because such concealment constitutes a denial of access to the courts. Yet the courts of the State of Michigan provide adequate remedies for concealment of such evidence, and when such remedies exist, no denial of access can be established. What the petitioner actually asks is that this Court hold that *any* obstruction of state judicial proceedings, no matter how minimal the effect and no matter how expansive the remedies provided by the state courts for such obstruction, is a federal constitutional tort because such obstruction constitutes a denial of access to the courts. Yet the courts of the State of Michigan provide adequate remedies for obstruction of state judicial proceedings, and when such remedies exist, no denial of access can be established. What the petitioner actually asks is that this Court hold that 42 U.S.C. § 1983 replaces the normal state court remedies provided for concealment or spoliation of evidence by creating a new and expanded federal constitutional tort. The petitioner makes that request despite the simple and unassailable fact that she has never even *claimed* that the courts of the State of Michigan do not provide a remedy for the wrong she actually complains of.

The concurring opinion in *Swekel, supra*, App. A-4, 12-13, succinctly addresses the merit of petitioner's request:

> A concealment of evidence claim that would merely toll the running of the state statute of limitations or give rise to a state action for "spoiliation of evidence"

does not "deny access" to the state courts. There must be an allegation and then a showing that the doors of the state courthouse have been closed by the defendant's action or that the state court remedy has been rendered ineffective. We should not simply displace the normal state court remedies for spoliating or concealment of evidence or obstruction of state judicial proceedings with a new, expanded' loosely worded, federal constitutiuonal tort under § 1983. Right of access to the courts claimed under the federal constitution should be reserved for situations in which adequate state remedies are made unavailable and should not include mere claims of interference with evidence.

CONCLUSION

This case presents no issue of constitutional import or jurisprudential significance, but merely presents an instance where petitioner, despite being allowed to conduct unhindered discovery in a state court suit for damages and in the § 1983 action claiming deprivation of the right to access to the courts, has neither claimed nor established that the courts of the State of Michigan could not remedy any pre-filing abuses by state actors. The petition fails to demonstrate any compelling reason why a writ of certiorari should be granted. The petition fails to demonstrate any conflict between the decision of the Sixth Circuit Court of Appeals in this case and any decision of another United States Court of Appeals. The petition fails to identify any important federal question decided in this case which has not been previously settled by this Court, or which conflicts with relevant decisions of this Court. There is no compelling reason for granting the writ of certiorari requested. See Rules of the Supreme Court of the United States, Rule 10.

Respectfully submitted,

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